COMMONWEALTH OF VIRGINIA

At the relation of the

STATE CORPORATION COMMISSION **CASE NO. PUE980813**

Ex Parte: In the matter of considering an electricity retail access pilot program – Virginia Electric and Power Company

HEARING EXAMINER'S RULING

June 29, 1999

On June 11, 1999, Virginia Electric and Power Company ("Virginia Power" or "Company"), by counsel, filed a Motion for Protective Order in which it seeks confidential treatment of certain information potentially responsive to data requests from the Staff and other parties. Virginia Power attached a proposed Protective Order to its Motion. The Company contends that the procedures governing the treatment of "Confidential" and "Competitively Sensitive" information in the proposed Protective Order are consistent with those of Protective Orders previously entered by the Commission.

On June 18, 1999, the Staff filed a Response to Motion for Protective Order, requesting that Virginia Power's motion be denied. Instead, Staff proposes alternative language for a protective ruling that includes specific procedures for the provision of information alleged to be "Competitively Sensitive." Staff maintains that it patterned its recommendation after the Commission's directives in Case No. PUE980138,[1] which serves as the genesis to this proceeding.

A comparison of the protective language proposed by Virginia Power and the language offered by the Staff reveals only a few substantive differences. The main difference lies in the treatment of information alleged to be "Competitively Sensitive." The protective language proposed by Virginia Power provides that the party contending that specific documents, materials or information should not be discoverable due to their commercially or competitively sensitive nature bears the burden of proving that such information should not be discoverable.[2] Nonetheless, for purposes of responding to data requests propounded only by the Staff and the Division of Consumer Counsel, Office of the Attorney General ("Attorney General"), the Company states that it will produce such information subject to a separate nondisclosure agreement. Thus, under Virginia Power's proposed protective language, only the Staff and the

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[1] *Commonwealth of Virginia, At the relation of the State Corporation Commission, Ex Parte: In the matter of requiring reports and actions related to independent system operators, regional power exchanges and retail access pilot programs,* Case No. PUE980138, Order Establishing Investigation (March 20, 1998).

[2] Paragraph (5) of Virginia Power's Proposed Protective Order.

Attorney General would be permitted to view information deemed to be "Competitively Sensitive."

On the other hand, Staff insists that based on the strong public interest at issue in this case, all parties, not just Staff and the Attorney General, should be given access to information labeled "Competitively Sensitive." Consequently, Staff offers protective language that would permit other parties to view, but not copy, "Competitively Sensitive" information. In addition, persons currently engaged in marketing activities will not be permitted to view "Competitively Sensitive" information and persons viewing such information will be barred from engaging or consulting in marketing activities for three years. Finally, parties asserting that information should be treated as "Competitively Sensitive" must file a supporting affidavit when supplying such information.

Pursuant to a Hearing Examiner's Ruling dated June 22, 1999, additional comments concerning the language for a protective ruling were received from the Division of Consumer Counsel, Office of the Attorney General ("Attorney General"); the Virginia Committee for Fair Utility Rates ("Virginia Committee"); Old Mill Power Company ("Old Mill"); and Virginia Power on June 25, 1999.

In its comments, the Attorney General offers five points. First, persons viewing confidential information should be required to sign an agreement to adhere to the Examiner's ruling. Second, the protective ruling should clarity the Attorney General's handling of "Competitively Sensitive" information. Third, any ban on marketing activities should begin after the first viewing of such information. Fourth, if a marketing ban is adopted, it should be limited to two years, rather than three years as proposed by the Staff. Finally, the Attorney General recommends that any party requesting confidential or competitively sensitive treatment of information be required to file an affidavit that: (i) generally describes such information; (ii) specifies, in as explicit detail as possible, why such treatment is necessary; and (iii) provides all factual and legal predicates for such claims.

The Virginia Committee generally supports Staff's proposed protective measures. However, the Virginia Committee disagrees with Staff's proposed limitation that parties may review, but not copy "Competitively Sensitive" information. The Virginia Committee argues that this unusual limitation reduces or eliminates the value of access to information that may be critical to a party's development of alternative models, analyses or recommendations. In addition, the Virginia Committee contends that the Staff's proposed three-year marketing ban is unduly restrictive, vague, and overbroad. Instead, the Virginia Committee recommends that the Commission not restrict access to "Competitively Sensitive" information by a party's counsel or its experts working under counsel's supervision and retained for purposes of this case. Furthermore, the Virginia Committee asks that the Commission not impose any restrictions on marketing activities by those reviewing the "Competitively Sensitive" information.

Similarly, Old Mill filed comments critical of Staff's proposed marketing ban. Old Mill states that its experts in market research and pricing are the best qualified personnel to evaluate Virginia Power's proposed wires charges and the effect of these charges on Old Mill's ability to participate in Virginia Power's retail access pilot program. Old Mill also argues that wires

charges are optional. Thus, "[i]f Virginia Power doesn't want to disclose competitively sensitive information that is essential to evaluating the justness and reasonableness of its claim for the wires charge benefit, it can simply withdraw its claim."[3]

In its comments, Virginia Power generally adopts Staff's recommended treatment of "Competitively Sensitive" information, but offers several specific modifications to Staff's proposed language. The most significant change offered by Virginia Power concerns Staff's plan for the filing of all interrogatories and answers with the Clerk of the Commission along with an affidavit supporting the treatment of the answer as "Confidential" or "Competitively Sensitive." Instead, Virginia Power seeks to provide the information contained in the supporting affidavit as part of its answer. In addition, while supporting Staff's proposed limitations on the review of "Competitively Sensitive" information, Virginia Power offers that any review of such information should be in the offices of the producing party. Also, similar to the Attorney General, Virginia Power proposes language that requires persons agreeing to the terms of the protective ruling to evidence this in writing.

Moreover, Virginia Power recommends several other clarifications to the specific protective language proposed by Staff. These changes include: (i) language to make it clear that "Competitively Sensitive" information is subject to more limited access than "Confidential" information; (ii) clarification that the protective ruling also covers information produced for itself or on behalf of its affiliates; (iii) persons authorized to have access to "Confidential" information must be authorized in accordance with the protective ruling; and (iv) parties that argue that documents or materials are not "Confidential" or "Competitively Sensitive" continue to be prohibited from disclosing such information until the Commission finds otherwise. Finally, while it does not offer any alternative language, Virginia Power requests the Commission recognize that "Competitively Sensitive" information may be objectionable on other grounds, such as relevancy.

As Virginia Power's comments demonstrate, the parties are in general agreement as to the treatment of "Confidential" information. With the exception of the paragraph pertaining to "Competitively Sensitive" information, there was little difference between the protective language proposed by Virginia Power and Staff. Thus, I find Virginia Power's proposed language should be used as a starting point, modified where appropriate, for differences with the Staff and clarifications offered by the Attorney General and the Company.

As to protective language regarding "Competitively Sensitive" information, which is contained in paragraph 5 of the protective ruling below, the issues raised by the parties can be grouped under two topics. Issues related to whether "Competitively Sensitive" information should be filed with the Clerk of the Commission and whether claims for protective treatment must be made in affidavits or answers will be addressed in the section below titled: *Treatment of Competitively Sensitive Information*. Issues related to whether "Competitively Sensitive" information may be copied, or whether individuals reviewing such information should be subject to a marketing ban are discussed in the section titled: *Access Limitations*.

[3] Response To Virginia Power's Motion for Protective Order and to Staff's Response to Motion for Protective Order at ¶ 8.

Treatment of Competitively Sensitive Information

Rule 6:4 of the Commission's Rules of Practice and Procedure[4] provides for a broad standard for discovery.

> Interrogatories may relate to any matter, not privileged, which is relevant to the subject matter involved . . . . It is not necessarily grounds for objection that the information sought will be inadmissible at the hearing if such information appears reasonably calculated to lead to the discovery of admissible evidence.

The introduction of competition into the regulatory paradigm has increased the likelihood of regulatory decisions that must be based, at least in part, on information alleged to be "Competitively Sensitive." Thus, all parties interested in participating fully in the regulatory process may require access to "Competitively Sensitive" information. However, access to "Competitively Sensitive" information may create competitive advantages or disadvantages for parties interested in participating in the regulatory process. Therefore, in recent cases, the Commission has attempted to balance the competing concerns regarding "Competitively Sensitive" information. Where such information must be used, additional protective measures have been employed to mitigate any impact the information may have on competition between the parties.

For example, in *Application of GTE Communications Corporation of Virginia, For a certificate of public convenience and necessity to provide local exchange telecommunications service*, Case No. PUC980080, the Chief Hearing Examiner rejected a request for a blank immunity from the discovery of "Competitively Sensitive" information.[5] Instead, the Chief Examiner adopted a case-by-case regime, designed to balance interests and to vary protective measures.

> No party contests the need for protective measures in this case. Thus there appears to be a need for a procedure which will protect the parties against public disclosure of confidential information. There also may be information that is relevant but so commercially sensitive that production in a more limited manner is justified. In those circumstances, GTE-CC has the burden to show that information which it seeks to protect from discovery is commercially sensitive and that the procedures for treatment of confidential information provided herein will not adequately safeguard its interests. All parties should also be prepared to address why their interests in this case cannot be fairly safeguarded by allowing only counsel and their designated regulatory or legal

[4] 5 VAC 5-10-480.

[5] *Application of GTE Communications Corporation of Virginia, For a certificate of public convenience and necessity to provide local exchange telecommunications service*, Case No. PUC980080, Hearing Examiner's Ruling at 3 (September 14, 1998).

> personnel and outside experts, employed or retained by the parties and under the direction and control of counsel, to review, but not copy, the documents sought to be protected.[6]

The Chief Examiner based her decision in PUC980080, in part, on *Coca-Cola Bottling Company v. Coca-Cola Company*,[7] which held the formulae for Coca-Cola to be subject to discovery.

> Except for a few privileged matters, nothing is sacred in civil litigation; even the legendary barriers erected by The Coca-Cola Company to keep its formulae from the world must fall if the formulae are needed to allow plaintiffs and the Court to determine the truth in these disputes.[8]

As Staff points out, one of the central issues of this case will be the determination of wires charges to be paid by Virginia Power's customers who choose an alternative supplier of electric energy. Under parameters recently established by the General Assembly, such wires charges must:

> be the sum (i) of the difference between the incumbent utilities' capped unbundled rates for generation and projected market prices for generation, . . . and (ii) any transition costs incurred by the incumbent electric utility . . . ; however, the sum of such wires charges, the unbundled charge for transmission and ancillary services, the applicable distribution rates . . . and the above projected market prices for generation shall not exceed the capped rates . . . applicable to such incumbent electric utility.[9]

Because the determination of wires charges may be based on information that Virginia Power deems "Competitively Sensitive," and because of the potential impact of wires charges on competitive energy providers, Staff avers that all participants in this case should be able view the information upon which such charges are determined. Moreover, Staff argues that in Case No. PUE980138, which, among other things, considered electric retail access pilot programs and spawned this proceeding, the Commission specifically recognized the need for all parties to have access to "Competitively Sensitive" information.[10]

In its comments filed on June 25, 1999, Virginia Power agrees to provide all parties with limited access to information it alleges to be "Competitively Sensitive." Consequently, I find

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[6] *Id.*
[7] 107 F.R.D. 288 (D. Del. 1985).
[8] *Id.* at 290.
[9] Virginia Code § 56-583 A.
[10] *Commonwealth of Virginia, At the relation of the State Corporation Commission, Ex Parte: In the matter of requiring reports and actions related to independent system operators, regional power exchanges and retail access pilot programs*, Case No. PUE980138, Order Establishing Investigation at 4, 13-15 (March 20, 1998).

little need to impose procedures for the filing of affidavits or the filing of "Confidential" or "Competitively Sensitive" information with the Clerk's Office. Information describing the underlying information and support for the contention that the requested information is "Competitively Sensitive" need be provided only when a party refuses to provide requested information (in response to a motion to compel) or when a party challenges the designation of the information as "Confidential" or "Competitively Sensitive."

Therefore, the protective language in Paragraph (5) of the protective ruling is broken into two parts. Paragraph (5)(a) covers situations where a party provides access to information it deems "Competitively Sensitive" without objection. Paragraph (5)(b) contains a detailed list of information that must be filed in response to a motion to compel if one of the grounds for objection is that the requested information is "Competitively Sensitive." The information required by Paragraph (5)(b) is consistent with the Commission's directive in Case No. PUC990100.[11]

Access Limitations

As noted above, the Attorney General, Virginia Committee, and Old Mill raise several issues regarding limitations on the access to "Competitively Sensitive" information. As proposed by Staff, and supported by Virginia Power, such access to "Competitively Sensitive" information is limited to review (no copying) only by individuals who are not or will not be engaged in marketing activities for up to three years. Generally, these parties question the limitations on copying "Competitively Sensitive" information, and the prohibition of review by individuals who are or will be engaged in marketing activities for up to three years.

The Virginia Committee questions the copying limitations claiming that such restrictions should be limited to rare circumstances as they unduly restrict use of the "Competitively Sensitive" information. Instead, the Virginia Committee argues the Commission should resist the temptation to impose, in advance, a blanket restriction on copying "Competitively Sensitive" information and leave the burden of identifying circumstances that warrant limitations on copying such information on the disclosing party.

However, under the Staff's proposal, the burden for supporting the need for classifying information as "Competitively Sensitive" is on the disclosing party. If a requesting party believes that information should not be treated as "Confidential" or "Competitively Sensitive," upon motion, the disclosing party will be required to prove to the contrary. Moreover, it is anticipated that most information can be protected adequately if it is treated as "Confidential." As the restrictions imply, designation as "Competitively Sensitive" should be limited to situations where disclosure of the information, even on a "Confidential" basis may be harmful to the disclosing party. Therefore, I find the protective ruling should limit the copying of "Competitively Sensitive" information.

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[11] *Joint Petition of Bell Atlantic Corporation and GTE Corporation, For an approval of agreement and plan of merger*, Case No. PUC990100, Protective Order at ¶ 5 (June 24, 1999).

As to the three-year marketing ban, the Virginia Committee and Old Mill oppose any marketing restrictions. The Attorney General recommends the three-year restriction be reduced to two years and proposes that the beginning of the marketing ban period begin with the viewing of the "Competitively Sensitive" information. As described above, the Virginia Committee maintains that restrictions related to marketing activities, either current or subsequent, should not serve as a limitation on access to "Competitively Sensitive" information by a party's counsel or its experts working under counsel's supervision. Moreover, Old Mill complains that Staff's proposed marketing ban may eliminate its ability to evaluate Virginia Power's proposed wires charges and the effect these charges have on Old Mill's ability to participate in Virginia Power's retail access pilot program.

Here again, concerns regarding the limitations to the access of "Competitively Sensitive" information relate to whether such information is classified properly. Access to and use of information classified and treated as "Confidential" is limited to purposes of this case. Thus, the only information that should be classified as "Competitively Sensitive" is information can not be protected adequately or whose potential damage can not be mitigated by only disclosing the information on a "Confidential" basis. Furthermore, Virginia Power already has filed its proposed wires charges, and its calculation of the market price for each of its customer classes. Virginia Power did not file any of that information as confidential. Thus, in the abstract, it is difficult to see how Old Mill is precluded from evaluating its ability to participate in Virginia Power's retail access pilot program. Nor should Virginia Power forfeit its right to request wires charges simply because a party may request "Competitively Sensitive" information. Therefore, I find Staff's proposed marketing limitations should be included in the language of the protective ruling.

Finally, regarding the recommendations of the Attorney General, I agree that the period for the marketing ban should begin when the information is first viewed. However, I disagree with the Attorney General's proposal to shorten the marketing ban period from three to two years. The three-year recommendation is based on precedent from a telecommunications case where competition, or its development, is further along. I am reluctant to establish a marketing ban period of a shorter duration in this case. Accordingly,

IT IS DIRECTED THAT any documents, materials, and information to be produced by Virginia Power, either for itself or for its affiliates, or to be produced by any other party ("Other Party"), in this proceeding in response to Commission orders, Commission Staff ("Staff") or Division of Consumer Counsel, Office of the Attorney General ("Attorney General") data requests, or properly propounded interrogatories or requests for production of documents from Other Parties in this proceeding, which documents, materials, or information the producing party designates and clearly marks as confidential ("Confidential Information"), shall be produced, examined and used only in accordance with the following conditions:

(1) All Confidential Information produced to Virginia Power, Staff, Attorney General, or Other Parties shall be used solely for the purposes of this proceeding (including any appeals).

(2) Access to Confidential Information shall be specifically limited to Virginia Power, Staff, Attorney General, or Other Parties, their counsel and expert witnesses, and to support

personnel who are working on this case under the direction of their counsel or expert witnesses and to whom it is necessary that the Confidential Information be shown for the purposes of this proceeding, so long as each such person has executed an Agreement to Adhere to Protective Ruling ("Agreement"), which is Attachment A to this Ruling. All Agreements shall be promptly forwarded to the producing party upon execution.

(3) In the event that Virginia Power, Staff, Attorney General, or Other Parties seek permission to grant access to any Confidential Information to any person other than the persons authorized to receive such information under paragraph (2) above, the party desiring permission shall obtain the consent of counsel for the producing party. In the event of a negative response, the party seeking disclosure permission may apply to the Commission for such permission.

(4) The producing party shall be under no obligation to furnish Confidential Information to persons other than those authorized to receive such information under paragraph (2) above unless specifically ordered by the Commission to do so. Parties are encouraged to seek consents to the maximum extent practicable.

(5) (a) Where a party contends that due to the Competitively Sensitive nature of requested documents or materials the procedures for treatment of Confidential Information fail to provide adequate safeguards, the party producing the Competitively Sensitive material shall be required to provide the documents for review, in the offices of the producing party, by only counsel and designated regulatory and legal personnel and outside expert witnesses, employed or retained by the parties and under the direction and control of counsel. These parties may review, but not copy, the documents sought to be protected, and they must agree to treat the Competitively Sensitive Information according to the provisions of this protective ruling to the maximum extent applicable, and shall sign and forward an Agreement (Attachment A) to the producing party. Employees, officers, or directors of a party, or consultants or experts retained by a party, who have been and who are currently involved in marketing shall not be provided access to Competitively Sensitive Information. Individuals who become viewing representatives under this paragraph may not engage in or consult in any marketing activities proscribed in the previous sentence for three (3) years beginning and continuing after first viewing such Competitively Sensitive Information. A party may not withhold access to information solely on the basis that the requested information is Competitively Sensitive.

(b) Where a party contends that it should not be required to produce specific documents or materials due to their Competitively Sensitive nature and some other grounds, such as relevancy, the party raising such an objection must state clearly each of its grounds for objecting to the interrogatory or data request including that the requested information is Competitively Sensitive. In responding to any motions to compel, the party contending that it should not be required to produce the Competitively Sensitive Information shall specify any factual or legal predicates supporting its claim and shall provide a log enumerating all such information. The log shall specify the following about the information withheld: (i) the original requesting party; (ii) the data request number and date of the request; (iii) the type of information (*e.g.*, computer-stored information, microfilm, letter, memorandum, policy circular, minute book, telegram, chart, etc.) or some other means of identifying the requested information; (iv) its

present location and custodian; (v) the nature of the information; and (vi) why the procedures for treatment of Confidential Information are not adequate safeguards.

(6) The Clerk of the Commission is directed to maintain under seal all documents, materials, and information filed with the Commission in this proceeding which the producing party has designated, in whole or in part, as Confidential Information or Competitively Sensitive Information.

(7) In the event Virginia Power, Staff, Attorney General, or Other Parties seek to introduce at a hearing testimony, exhibits, or studies that disclose Confidential Information, the Staff, Attorney General, or the party seeking such introduction shall:

(a) notify the producing party at least three (3) days in advance of any such hearing regarding testimony that is not prefiled unless a shorter period would not unduly prejudice the producing party;

(b) if such testimony is prefiled, file such testimony, exhibits or studies with the Commission under seal and serve on all parties of record copies of the testimony, exhibits, or studies deleting those parts that contain references to or portions of the designated Confidential Information. The testimony, exhibits, or studies containing the Confidential Information filed with the Commission shall be kept under seal unless and until the Commission rules to the contrary. Each party shall, upon signing Attachment A hereof, receive a copy of those parts of the testimony, exhibits, or studies that contain references to or portions of the Confidential Information and each party and counsel shall be bound by this ruling insofar as it restricts the use of and granting of access to the Confidential Information.

(8) Oral testimony regarding Confidential Information, if ruled admissible by the Commission, will be taken *in camera* and that portion of the transcript recording such testimony shall be placed in the record under seal.

(9) In the event Virginia Power, Staff, Attorney General, or Other Parties seek to introduce at a hearing testimony, exhibits or studies that disclose Competitively Sensitive Information, the Staff, the Attorney General, or the party seeking such introduction shall notify the producing party at least ten (10) days in advance of any such hearing unless a shorter period is necessary or would not unduly prejudice the producing party. Any testimony regarding Competitively Sensitive Information shall be taken *in camera* and in the presence of only those persons who have been granted access to the specific Competitively Sensitive Information pursuant to a nondisclosure agreement with the producing party. That portion of the transcript recording such testimony shall be placed in the record under seal.

(10) No person authorized under this Protective Order to have access to Confidential Information or Competitively Sensitive Information shall disseminate, communicate, or reveal any such Confidential Information or Competitively Sensitive Information to any person not specifically authorized under this Ruling to have access.

(11) At the conclusion of this proceeding (including any appeals), any originals or reproductions of any Confidential Information produced pursuant to this Order shall be returned by Virginia Power, Attorney General, and Other Parties to the producing party (or destroyed) if requested to do so by the producing party. At such time, any originals or reproductions of any Confidential Information in Staff's possession will be returned to the producing party, destroyed or kept with Staff's permanent work papers in a manner that will preserve the confidentiality of the Confidential Information. Insofar as the provisions of this Ruling restrict the communications and use of the Confidential Information produced thereunder, such restrictions shall continue to be binding after the conclusion of this proceeding (including any appeals) as to the Confidential Information.

(12) This Ruling does not preclude Virginia Power, Staff, Attorney General, or any Other Party from arguing, prior to public disclosure, that documents, materials, and information received under the Ruling should not be treated as Confidential or Competitively Sensitive. But in no event shall any party disclose Confidential or Competitively Sensitive Information it has received subject to this Ruling absent a finding by the Examiner or the Commission that such information does not require confidential treatment. Any party objecting to treating information as either Confidential or Competitively Sensitive may file with the Clerk of the Commission a motion seeking *in camera* review by the Hearing Examiner of the documents alleged to be subject to treatment as Confidential or Competitively Sensitive. The burden of proving that documents, materials, or information should be treated as Confidential or Competitively Sensitive shall be upon the proponent of maintaining the documents, materials, or information in such confidence.

(13) A producing party is obligated to separate non-confidential and non-competitively sensitive documents, materials, and information from Confidential Information and Competitively Sensitive Information wherever practicable, and to provide the non-confidential and non-competitively sensitive documents, materials, and information.

(14) Any party who obtains Confidential Information or Commercially Sensitive Information and thereafter misuses it in any way shall be subject to sanctions as the Commission may deem appropriate, in addition to any other liabilities which might attach from such misuse.

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Alexander F. Skirpan, Jr.
Hearing Examiner

Attachment A

BEFORE THE
STATE CORPORATION COMMISSION
COMMONWEALTH OF VIRGINIA

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At the relation of the

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Ex Parte: In the matter of considering an electricity retail access pilot program – Virginia Electric and Power Company

AGREEMENT TO ADHERE TO PROTECTIVE RULING

I, _____, on behalf of and representing _____, hereby acknowledge having read and understood the terms of the Protective Ruling entered in this proceeding by the Hearing Examiner on June 29, 1999, and agree to treat all Confidential Information and Competitively Sensitive Information that I receive, review, or to which I have access in connection with this Case No. PUE980813 as set forth in that Protective Ruling.

Signature:_____

Printed Name: _____

On behalf of: _____